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CITATIONS

526765—43

In the Supreme Court of the United States

October Term, 1942

No. 952

Great Lakes Coca-Cola Bottling Company,
petitioner

v.

Guy T. Helvering, Commissioner of
Internal Revenue

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 39-43) is reported at 133 F. 2d 953. The opinion of the United States Board of Tax Appeals (R. 17-20) is not officially reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 6, 1943 (R. 44). The pe-

tition for a writ of certiorari was filed on April 23, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The taxpayer corporation transferred all of its assets to several new corporations in exchange for their capital stock, which it distributed to its own stockholders in exchange for its own stock, and thereupon dissolved. The question is whether, in computing its income subject to the undistributed profits tax imposed by Section 14 of the Revenue Act of 1936, the taxpayer is entitled to a dividends-paid credit under Section 27 (f) of that Act equal to the amount of its adjusted net income for that portion of the taxable year preceding the transfer of its assets to the new corporations.

STATUTE INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648:

> SEC. 27. CORPORATION CREDIT FOR DIVIDENDS PAID.
>
> (a) *Dividends Paid Credit in General.*—For the purposes of this title, the dividends paid credit shall be the amount of dividends paid during the taxable year.
>
> * * * * *
>
> (f) *Distributions in Liquidation.*—In the case of amounts distributed in liquidation the part of such distribution which is properly chargeable to the earnings or

> profits accumulated after February 28, 1913, shall, for the purposes of computing the dividends paid credit under this section, be treated as a taxable dividend paid.
>
> * * * * *

STATEMENT

The facts in this case as found by the Board of Tax Appeals (R. 17–18) are not in dispute. The taxpayer was a Delaware corporation. On November 30, 1937, in pursuance of a plan of reorganization, the taxpayer transferred all of its assets, including its earnings for the period from January 1, 1937, to November 30, 1937, to various Michigan, Ohio, and Nevada corporations, in exchange for the stock of these new corporations. The taxpayer then distributed such stock in the new corporations to its stockholders in exchange for their stock of the taxpayer and the taxpayer was liquidated. These transactions were nontaxable exchanges under Section 112 (b) (3) and (4) of the Revenue Act of 1936 and no gain or loss was recognized thereon. (R. 17–18.)

As of January 1, 1937, the taxpayer had an operating deficit of $36,988.92. For the purpose of the computation of the surtax imposed by Section 14 of the Revenue Act of 1936, the taxpayer's adjusted net income for the taxable year 1937 was $195,262.14. (R. 18.)

In an amended petition filed with the Board of Tax Appeals, the taxpayer claimed a credit under Section 26 (c) (1) of the 1936 Act equal to

the amount of its operating deficiency of $36,-988.92 as of January 1, 1937, in computing the surtax imposed under Section 14 of the 1936 Act. It later abandoned this claim. (R. 18.)

In the proceeding before the Board and before the court below, the taxpayer claimed a dividends-paid credit under subsection (f) of Section 27 of the 1936 Act equal to the amounts of its adjusted net income for the period from January 1, 1937, to November 30, 1937 (R. 17, 18). Whether the taxpayer is entitled to this credit is the only question passed upon by the Board and the court below, and is the only question presented by the petition for a writ of certiorari. The Board of Tax Appeals disallowed this credit (R. 18–20) and its decision was affirmed by the Circuit Court of Appeals for the Seventh Circuit (R. 39–44). However, the Circuit Court of Appeals ordered the case remanded to the Board of Tax Appeals to determine whether the taxpayer is entitled to any dividends-paid credit under Section 26 (c) of the 1936 Act, as amended retroactively by Section 501 of the Revenue Act of 1942, Public Law 753, 77th Cong., 2d Sess. (R. 43).

ARGUMENT

The taxpayer's petition for a writ of certiorari is based primarily upon the allegation that the decision of the Circuit Court of Appeals in this case is in conflict with the decision of this Court in *Commissioner* v. *Credit Alliance Corp.,* 316 U. S. 107, affirming the decision of the Circuit Court

of Appeals for the Fourth Circuit, 122 F. 2d 361, and the decision of the Circuit Court of Appeals for the Second Circuit in *Commissioner* v. *Kay Mfg. Corp.*, 122 F. 2d 443 (Pet. 8–10). The taxpayer further alleges that the decision below is in conflict with the decision of the same court rendered two days later in *Commissioner* v. *Winchester Rep. Arms Co.*, 134 F. 2d 6 (Pet. 9–10).

In all of these cases, however, the existing corporation was liquidated and its assets distributed to its stockholders. In each instance the dissolved corporation had an accumulated surplus which had been acquired subsequent to March 1, 1913, and which could have been distributed to stockholders as an ordinary dividend rather than as a part of the distribution in complete liquidation. The courts held that under those facts Section 27 (f) was applicable and that the liquidating corporation was entitled to a dividends-paid credit equal to the accumulated surplus which was distributed in liquidation.

The facts in the instant case are different, as the opinion below points out. This taxpayer transferred its assets, including its earnings for that part of the taxable year preceding the transfer, to several new corporations in exchange for their stock, which it then distributed to its shareholders. As pointed out by the court below (R. 41–42), the taxpayer corporation was dissolved but its business was continued by its successor corporations. The assets of the business, includ-

ing the earnings of the business for the period from January 1, 1937, to November 30, 1937, were held by the new corporations. The stockholders had simply exchanged their stock in the old corporation for the stock of the new. The accumulated earnings had not been distributed to the taxpayer's stockholders, but had merely been shifted to the new corporations in a tax-free exchange. In these circumstances the court below properly held, that this was not the distribution in liquidation contemplated by Section 27 (f) of the statute.

The only other case involving this same factual situation is *Reed Drug Co.* v. *Commissioner,* 130 F. 2d 288, in which the Circuit Court of Appeals for the Sixth Circuit reached the same result as did the court below.

CONCLUSION

The decision of the court below is correct and is not in conflict with any other decision. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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